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No. 04-604

Supreme Court, U.S.
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In The

Supreme Court of the United States

"THE PUBLIC ENTITIES," and/or "PROGRAMS OR ACTIVITIES," of CITY OF TUCSON, and the TUCSON POLICE DEPARTMENT (TPD), and its CHIEF SMITH, and CAPTAIN(S) LEAVITT, DAYKIN, DANAHER, AND OTHER OFFICERS AND DETECTIVES LISTED AT "2-A-2B," and MAYOR MILLER,

Petitioners,

v.

DENNIS DAVID McCULLEY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Should not this Court deny certiorari where:

[1] the case is controlled by *Heck v. Humphrey*, 512 U.S. 475, 487, 114 S.Ct. 2364, 2372 (1994), which states that ("the plaintiff [must] demonstrate that the conviction or sentence [A.R.S. section 13-1204(A)(2) and (C)] has already been invalidated. [And] if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding [misdemeanor] criminal judgment against the plaintiff, the action should be allowed to proceed. Citing Note #7);

[2] the Ninth Circuit Court of Appeals Took Judicial Notice of The Laws Stated Herein; and

[3] when the criminal trial court, in McCulley's case designated the offense a misdemeanor, given the language of A.R.S. section 13-702(G), and 13-907(A)(B)(2), the court had to, and did, make a finding that one of the necessary elements of the original offense was not there, is one that may judicially be noticed; and resulted in a "favorable termination"?

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INTRODUCTION

Petitioner's argument that Respondent McCulley's post-conviction relief due to ineffective assistance of counsel did not result in a 'favorable termination' of the underlying criminal convictions pursuant to *Heck v. Humphrey* because the charges remained pending even after the petition was granted, clearly misses the point of McCulley's Motion for Judicial Notice. Moreover, it does not answer the central argument, whether the Ninth Circuit abused it's discretion by taking judicial notice of the laws of the State of Arizona, which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. And whether the criminal trial court's determination, based on those laws, indicated a 'favorable termination'? The language of the statutes, and based upon the criminal trial court having ordered the case designated a misdemeanor on October 23, 2001; and then on April 1, 2004 granting McCulley's Motion to Set Aside Conviction and ORDERING in-part: [1] The judgment and conviction in this case is set aside and vacated; [2] The plea of guilty is withdrawn; [3] The indictments/citations/complaints are dismissed with prejudice, was a 'favorable termination' and a finding that McCulley was found not guilty of the original underlying charge, of the use of a deadly weapon.

STATUTES AND RULES INVOLVED

The statutes and rules involved are Rule 201, Federal Rules of Evidence; Rule 40(a)(3), Federal Rules of Appellate Procedure; and Rule 31.1, Arizona Rules of Criminal

Procedure; and Arizona Revised Statute section(s) 13-1204(A)(2) and (C); 13-1204(A)(5) and (B); 13-702(G); and 13-907(A)(B)(2), set out in full as follows:

STATEMENT OF THE CASE

On August 17, 2000, the Arizona Court of Appeals MEMORANDUM DECISION, was filed in 2 CA-CR 00-0056-PR, Department A, regarding the trial court granting McCulley's Rule 32 Petition, based on evidence of an insanity defense. This court granted the Petition for Review from The Superior Court of Pima County, in Cause No. CR 50819, but denied relief. The Arizona Appeals Court concluded that the evidence demonstrated that McCulley had a long history of bipolar affective disorder, dating to at least 1986; and that he was manic and apparently actively psychotic at the time of this incident in September 1995. The balance of the opinion clearly stated demonstrated the basis of that opinion.

On October 23, 2001, McCulley first pled guilty to A.R.S. section 13-1204(A)(5) and (B). (Petitioners Exhibit H) This charge did not include any element of use of a deadly weapon or dangerous weapon. The trial court then attempted to determine what happened, and McCulley stated that he didn't know and asked to present his UMC first disclosure statement. McCulley was not allowed to do so, and the State suggested a plea of no contest. McCulley stated he didn't know what that meant, and the court stated "It means in your mind you are probably not guilty, you think you are not. If it went to a jury, they could find you guilty and – we know [the] jury found [you] guilty under different evidence." A no contest plea was allowed

with the understanding that after 364 days of probation, with no further criminal offense the State will not object to the Court designating the offenses a misdemeanor. 364 days later the court designated the offenses a misdemeanor.

Arizona Revised Statute section 13-702(G), Rules for Sentencing state that:

G. Notwithstanding any other provision of this title, if a person is convicted of any class 6 felony not involving the intentional or knowing infliction of serious physical injury or the discharge, use or threatening exhibition of a deadly weapon or dangerous instrument and if the court, having regard to the nature and circumstances of the crime and the history and character of the defendant, is of the opinion that it would be unduly harsh to sentence the defendant for a felony, the court may enter judgment of conviction for a class 1 misdemeanor and make disposition accordingly or may place the defendant on probation in accordance with chapter 9 of this file and refrain from designating the offense as a felony or misdemeanor until the probation is terminated. The offense shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense as a misdemeanor. This subsection does not apply to any person who stands convicted of a class 6 felony and who has previously been convicted of two or more felonies. If a crime or public offense is punishable in the discretion of the court by a sentence of a class 1 misdemeanor, the offense shall be deemed a misdemeanor if the prosecuting attorney:

1. Files an information in superior court designating the offense as a misdemeanor.

2. Files a complaint in justice court or municipal court designating the offense as a misdemeanor within the jurisdiction of the respective court.

3. Files a complaint, with the consent of the defendant, before or during the preliminary hearing amending the complaint to charge a misdemeanor.

(Petitioners' Appendix, F at App. 18-19)

Pima County Prosecutor Guidelines at P. 2 Stated that:

2.B. Where the offense is charged as a class 6 felony, no injuries inflicted in the victim, the defendant has no criminal history and no priors, with victim input, a plea to a misdemeanor or waiver to city/justice is authorized.

3. Misdemeanor Assault (Charging and/or pleas):

Charging or pleading an assault on a police officer as a misdemeanor is appropriate if the assault does not fall within the circumstances listed above, and the officers concur in a negotiated lesser plea. Misdemeanor assault charges may also be appropriate where the suspect's conduct would otherwise call for class 6 felony charges, but the officer's behavior has been unnecessarily provocative or overbearing, or the resulting injury to the suspect is disproportionately severe to the injury inflicted upon, or sought to be inflicted upon, the officer.

On April 1, 2004, the trial Court further displayed the fact of "favorable termination," by granting McCulley's Motion to Set Aside (Petitioners' Appendix F, at App. 19-21); after full arguments by the State, and after Officers Schwenn and Peasley had an opportunity to state their

positions and McCulley presented his position at the hearing, pursuant to A.R.S. section 13-907.

This statute is fully set forth in Petitioners' Petition for a Writ of Certiorari at P. 5-6, and in their Appendix at F, PP. 19-21. The Order stated in-part that: [1] The judgment and conviction in this case is set aside and vacated; [2] The plea of guilty is withdrawn; [3] The indictments/citations/complaints are dismissed **with prejudice**. (Appendix H)

In September 1995, Dennis McCulley was arrested, charged with, and convicted of two counts of Aggravated Assault with a Dangerous Weapon on a Police Officer Engaged in Official Duties. The trial court at Judgment and Sentencing on October 8, 1996 stated that "technically I guess he was found just simply aggravated assault on a police officer while engaged in the execution of an official duty, although there is no specific finding, as I recall, that it was dangerous nature deadly weapon." (Appendix I) McCulley's medical condition, i.e., a bipolar/manic depressive, who took several medications, and who saw a psychiatric doctor, Dr. Nelson, was known both to TPD Officers' Schwenn and Peasley, (Appendix J, K), and to the investigating Detectives Olivas and K. Thomson, knew a great deal more TPD also ignored a report, just forty-eight hours earlier by Officer Van Ardoy who documented McCulley's mood swings, rapid speech and paranoid thinking about the police being at his home. (Appendix M) TPD also knew from a UMC psychiatric report of Dr. Mardis that McCulley's latest episode was manic, with congruent psychotic features.

McCulley's manic episode had caused him to start drinking Tuesday, September 5, 1995. (Appendix N, O, P)

at some time just after midnight on September 7th, 1995, decided that he needed to get to the hospital, West Center.

The incident resulted from inaccurate information from TPD's 911 dispatchers/call-takers. (Appendix Q, R) McCulley was calling 411 information, misdialed, got 911 and before speaking to anyone hung up. 911 recontacted, and asked McCulley if he needed police or medical unit. McCulley replied "No, he was OK." 911 probed as to why a call had been made and McCulley told them he was calling 411 information. 911 seemed OK with this response. The time was 12:20 a.m. (Appendix Q, R) At 12:24 a.m., that morning, McCulley did call 911 and spoke with a Bouchard. He told her that someone had been knocking on his door, and when he went to the door, there was no one there. McCulley told Bouchard that the person said "help." Bouchard asked some probing questions and then concluded that the person probably went to another door, because they didn't get a response. When McCulley indicated that he still didn't know what to do, Bouchard told him that she would have an officer check the area. And if he didn't see anyone at his door, he should go ahead and go back to bed. The time was 12:24. A text message then went out to field officers saying "comp says someone was banging on his door yelling for help. He thinks they are gone now. He does now want contact, but wants officer to check area." This inaccurate information was the reason TPD Officers Schwenn and Peasley were sent to McCulley's residence.

Officer Peasley was contacted first at 12:31 a.m., and told "copy 911 hang up, 450 E. Lee. Male subject is indicating a recontact, that someone was banging on his door for help. He's not sure they're gone now or what. He had no description of who it was or anything." TPD had just

combined the 911 hang up with the information from the second call and had repeated the inaccurate information to Officer Peasley. Officer Peasley believed he was responding to a 911 hang up call.

Officer Peasley stated in his first disclosure statement at the common practice of TPD in entering to secure a residence, by doing a protective sweep based on 911 hang up calls being considered as domestic violence calls. Officer Peasley further clarified at McCulley's trial he knew he didn't have accurate information when he gave the jury his reasoning to enter, based on the fact that "when you get a 911 hang up call, if you get supplemental information, it can be from different calls. It can be confused by the dispatchers. It's not always correct." Peasley explained that he was treating the call as a domestic violence call which allowed them to enter to secure the residence. **Petitioners have consistently concealed this information from the Arizona District Court, and the Ninth Circuit Court of Appeals, and now this Court.** The Petitioners' statements in their Petition for a Writ of Certiorari at PP. 6-7 are intentionally misleading.

Officer Peasley, at McCulley's trial, stated that they weren't sure exactly what was going on, and that the information was kind of confusing as to why a 911 call had been made. Officer Peasley described McCulley's words and actions when they wanted to enter as "he was intimidated, the fact that the police were at his house." The officers entered just after 12:42 a.m.

The officers did a protective sweep of the house, found McCulley to be alone and unhurt, but instead of leaving Officer Peasley told McCulley what he should and

shouldn't do when calling 911 and that he shouldn't hang up. Then Officer Schwenn, seeing a liquor bottle in the kitchen, asked McCulley if he had been drinking, and then McCulley started crying. Officer Schwenn stated that McCulley told them that he was fearful about an ex-tenant "Joe" who had lived there about a month earlier, had a key, and McCulley was fearful that he was trying to get in and kill him. Petitioners' statements were simply false.

According to Officer Peasley, at this point they learned that McCulley was seeing a doctor, Dr. Nelson, the kind of medications he took, and that McCulley was diagnosed as bipolar. Peasley even indicated that he knew one of the medications McCulley took because of his experience at the jail a few years earlier. Officer Peasley then said that McCulley started to talk a little bit more normal and they were going to leave. They told McCulley to close and lock the front door, but McCulley wouldn't come over to the door and lock it. McCulley again started crying "saying that he was scared."

Officer Schwenn described McCulley saying, "He's gonna kill me, they're gonna kill me." Schwenn replied, "No one's gonna kill you, you're fine, we're going to be coming back tonight and make sure you're fine, [by just] driving by." Schwenn would later say that McCulley was "saying that he wanted to die," however, neither officer said anything like this in their first disclosure statements. Schwenn then described McCulley as "he just, he wasn't listening, he wasn't responding to it [and] he started kind of rocking and looking real strange and he started mumbling . . . saying words, you can understand he was saying something, and it was weird." Then McCulley jumped up out of the chair, ran into the bedroom and slammed the door.

Schwenn did say that at this point they went outside, to call Sgt. Walters, and just back off; and that McCulley "was upset but he had never mentioned anything about killing himself yet or anything like that yet." Schwenn later said "he might of said he wanted to die, [but] he was upset . . . wasn't making any sense, wasn't listening to us."

Schwenn stated he was using the front door as cover, and Peasley was looking into McCulley's bedroom window. Schwenn described what happened next saying that when he heard McCulley first coming out of the bedroom it was then that he [allegedly] started saying, "I'm going to kill myself. I want to die." Schwenn said "No you don't we want to get you help, that's why we're getting somebody else here." McCulley, said, "Who you talking to? You're not talking to me. I don't want to die, are you going to shoot me?" Peasley, however, was recorded as saying at this point that "He's now stepped out of the bedroom. He now says he wants to die. He wants us to shoot him." According to Officer Peasley's first disclosure, this was the first time McCulley [allegedly] said anything about wanting to die.

Schwenn said, McCulley came out of the bedroom and "as soon as he came out and headed towards the kitchen, I drew my weapon. And [then] he grabbed the big knife first. Schwenn said "drop the knife, drop the knife," McCulley said, "shoot me . . . shoot me." McCulley went back into his bedroom, and Schwenn then called Officer Peasley in and said that McCulley had picked up a knife.

McCulley in his UMC first disclosure statement said that "he went to the kitchen to get a knife, and protect himself." And "he was just going in and out of phases, not really knowing who was there." McCulley said, "see I thought they came, and I thought they left, and then, I

didn't know, I didn't lock my door." And he "didn't know who was there, so he got that [knife] to protect himself, and then he was in his bedroom, and barricaded himself." And that he got the knife "because he thought, he didn't know who was out there, he couldn't see. And he just remember saying if it was a her, or [if] it was a him, but [if] he was a police officer, he didn't say, 'I'm a police officer, drop the knife.'"

Officer Schwenn confirmed in a deposition that at McCulley's trial he said that after McCulley went into his bedroom, he, nor Officer Peasley ever said again that in fact they were police officers.

Schwenn described McCulley as coming out of the bedroom on two different times, and saying "close the door, close the door," and retreated. Both times Schwenn refused. and then McCulley put down one of the knives.

The shooting story of Officer Schwenn changed throughout his first disclosure statement, from shooting McCulley at the front door of his home, to shooting him four or five feet away.

Officer Peasley's first disclosure statement, shows that in 520 words, that McCulley ran into the room, jumped on the couch, hit the wall and then was coming off the couch toward the door, and that the door closed halfway.

McCulley's statement was he [thought] he was shot just as he came around the corner into the living room. McCulley stated that at that point he thought it was the police and "walked out of the bedroom, and didn't remember what happened after that; and [wondered] whether he was carrying the knife in a threatening way. He said that

someone said "drop the knife," and it happened so fast that he didn't have a chance to drop the knife.

The officers have stated that they "tried to determine what to do, [but McCulley] ran at them with a large butcher knife and was then shot." This doesn't match their first disclosure.

The district court stated in an order dismissing McCulley's Complaint, filed July 15, 2002 at P. 3, N. 1, that the date of McCulley's filing his *pro se*, first 37-count complaint was on July 6, 1998, when he, as a prisoner gave it to prison officials for mailing. The district court dismissed the complaint, pursuant to a motion for summary judgment predicated on a statute of limitations argument. McCulley's Judgment and Sentence were on October 8, 1996. The Petitioners misrepresent the known facts in their statements to this Court by stating that the date of the filing of the first complaint was in August, 1998.

On October 23, 2001, McCulley pled no contest to A.R.S. section 13-1204(A)(5) and (B). This was done after the trial court refused to allow McCulley's UMC first disclosure statement as the factual basis of his plea. The Court told McCulley that a no contest plea "means in your mind you are probably not guilty, you think you are not. If it went to a jury, they could find you guilty and we know [that a] jury found [you] guilty under different evidence." It should be noted that McCulley argued to the Ninth Circuit that he should be allowed to show that this plea agreement was not voluntary. McCulley had presented over 150 arguments to the trial court, *pro se*, from February 22, 2000 to the October 23, 2001 plea hearing. The plea hearing was a direct result of those arguments.

McCulley's appeal to the Ninth Circuit Court of Appeals was denied on June 19, 2003. (*See* Petitioners' Appendix at C) McCulley filed on June 26, 2003 a Petition for Rehearing. McCulley claimed that, as defined in Fed.R.App.P., Rule 40 applied because (1) a material point(s) of fact or law had been overlooked in the decision; and (2) an apparent conflict with another decision of the Court was not addressed in the opinion.

McCulley stated that it was his understanding that the United States Supreme Court will not ordinarily consider issues neither raised before nor considered by court of appeals. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 147-150, 90 S.Ct. 1598, 1602-04 (1970). McCulley then stated that "the Ninth Circuit seemingly based their contention that McCulley's claim was based on being shot by police officers after he [allegedly] threatened them with a knife. (*See* 9th Cir. Memorandum filed June 19, 2003, at p. 2). This was not the complaints basis.

McCulley then referred to his Rule 32 and the outcome; and to the fact that the factual allegations of the complaint, if they were accepted as true, and all reasonable inferences, which must be drawn in favor of McCulley, the nonmoving party, and a complete reading (Informal Opening Brief) of his (Informed Reply Brief) displays that the facts stated in the Complaint support that he did not know the people who reentered his home, after the police left, were police; that the officers who reentered his house never identified themselves as police officers, and that he never threatened then with a knife but instead retreated. (*See* C.I. 123, at #3 (45-55) (63-72), and #4 Injury of Counts VI, IX.)

McCulley stated his understanding of when federal law determines when a cause of action accrues. McCulley argued the apparent conflict with another decision of the Court which was not addressed. McCulley presented argument from *Veal v. Geraci*, 23 F.3d 732, 735-36 (2nd Cir. 1994); and *Morales v. City of Los Angeles*, 214 F.3d 1151-1155 (9th Cir. 2000). This was another case directly relevant to McCulley's case, where an individual was shot . . . and then the police perjury and other misconduct caused [the plaintiff] to loose that case, thus depriving them of their due process right of access to the courts. McCulley then stated the issue in *Morales*, as determined by the Ninth Circuit Court Judge Silverman which held that the statute of limitations began to run when the plaintiffs lose their case in trial court and have judgment entered against them.

McCulley further argued that "perhaps the defendants and their attorney have attempted to submit evidence that they knew was false and misleading, regarding the actual date McCulley gave his first disclosure at UMC, [and that it] was an attempt to show McCulley was not 'insane' on September 8th, 1995."

McCulley made other arguments and in his conclusion stated in-part that he possessed several legal remedies, reasonably and in good faith pursued ones designed to lessen the extent of his injuries or damage. *Citing Alberti v. San Francisco Sheriff's Dept.*, 12 F.Supp.2d 1164, 1171-1173 (N.D.Cal. 1998). He then argued that dismissal without leave to amend was improper. He then stated that the decision should be reversed.

On February 12, 2004, the Ninth Circuit held that McCulley could not have brought his constitutional claims

until the conviction was overturned because they would have been barred by *Heck v. Humphrey*, 512 U.S. 477 (1994). And that the district court erred in dismissing McCulley's constitutional claims as statutorily barred. *See Harvey v. Waldron*, 210 F.3d 1008, 1016 (9th Cir. 2000). (Petitioners' Appendix B, p. 1-4)

On February 25th, 2004, the Appellees/Petitioners filed a Petition for Rehearing, and presented the fact of the October 23, 2001 determination by the trial court and the fact that McCulley was sentenced and the convictions were treated as class one misdemeanors. The Appellees argued that the final result in the federal court would have had to dismiss the case due to McCulley's ultimate convictions. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). (Appendix B)

The Ninth Circuit, on April 29, 2004, allowed McCulley to file his answer to the Appellees' Petition for Rehearing. (Petitioners' Appendix D)

On May 21, 2003, McCulley filed his Answer to Appellees' Petition for Rehearing. McCulley filed his answer, pursuant to Rule 40 of the Fed.R.App.P., to counter the claim that a material point of fact and law was overlooked in the decision filed February 12, 2004.

McCulley claimed in-part that an amended complaint "will be able to show new facts that he has not been recharged or convicted of the same alleged crime of assaulting the officers with a deadly weapon, a knife." *See Sappington v. Bartee*, 195 F.3d 234, 235 (5th Cir. 1999). McCulley referred to facts from his Informal Brief; and that he had raised the issue of his no contest guilty plea, plea discussion; and related statements, and in his reply to

the defendant's opposition to plaintiff's motion (C.I. 164, 171, 175, Exhibit A and Exhibit B).

McCulley argued at P. 4 the central issue of the case, i.e., "The Appellees in their Petition for Rehearing have raised the issue of pending criminal charges which resulted in a conviction. The Appellees in their Petition For Rehearing have raised the issue of the remaining pending criminal charges which resulted in a conviction. [And that] this issue [was] not found in their answer to this Court of Appeals. Therefore, McCulley contends that if this Appeals Court is going to allow their arguments in the Petition for Review that it must grant the Motion for Judicial Notice of Adjudicated Facts, pursuant to Fed.R.Civ.P., Rules of Evidence 201. . . . [And that] in fairness [the court] must now allow argu[ment] in a supplemental to this Answer, the voluntariness of a criminal defendant's guilty plea is questionable where a trial court exerts or even seems to exert the authority of its position to induce the defendant to plead guilty. *See Blase v. Appicelli*, 489 N.W.2d 129, 132 (Mich.App. 1992).

McCulley then referred to the relevant affidavits of UMC psychiatrist Dr. Mardis, and Tucson psychiatrist Dr. La Wall, and Psychologist Dr. Flynn.

McCulley, in his Conclusion stated that the Ninth Circuit did not rule on all factual allegations of the complaint in favor of McCulley, or accept as true all reasonable inferences, or draw them in favor of the nonmoving party as required. McCulley also argued the relevant juror's letter which was used throughout his complaint. McCulley stated that the Ninth Circuit made no mention or consideration of this letter.

McCulley argued that he possessed several legal remedies, reasonably and in good faith pursued ones designed to lessen the extent of his injuries or damages. *Citing Alberti v. San Francisco Sheriff's Dept.*, 12 F.Supp. 1164, 1171-1173 (N.D.Cal. 1998). And that "[D]ismissal without leave to amend [when the district court dismissed C.I. 113, 114, without prejudice] is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Citing Schneider v. California Dept. of Corrections*, 151 F.3d 1194, 1196 (9th Cir. 1998).

It was at this point that McCauley argued that "if this Appeals Court is going to allow their arguments in the Petition for Review that it must grant the Motion for Judicial Notice of Adjudicated Facts, pursuant to Fed.R.Civ.P., Rules of Evidence 201; and further allow McCulley, pursuant to Fed.R.Civ.P., Rules of Evidence 106, to respond with the remainder of or Related Writings or Recorded Statements, which ought in fairness to be considered contemporaneously with it, to fully address these issues."

McCulley further stated that he must now be allowed to argue in a supplemental to this Answer, the voluntariness of a criminal defendant's guilty plea is questionable where a trial court exerts or even seems to exert the authority of its position to induce the defendant to plead guilty. *Citing Blase v. Appicelli*, 489 N.W.2d 129, 132 (Mich.App. 1992).

Again McCulley discussed the fact that the issue from his 1983 claim was not based just on being shot, but rather the reentrance of McCulley's residence, the drawing of weapons, before McCulley grabbed a knife; and McCulley demonstrating that he didn't know it was a police officer by his statements to the officers and in his UMC statements.

McCulley then referred to his complaint, noting the facts of his mental illness that he alleged, and then the locations of the supporting facts in the complaint. McCulley then again stated his argument regarding excessive force and the mental illness issues, *citing* the Fourth Amendment to the United States Constitution, and *Drummond Ex Rel., Drummond v. City of Anaheim*, 343 F.3d 1052, 1058 (9th Cir. 2003). McCulley then cited the Pima County Prosecutor's Office requirements as to when they can treat a class 6 felony as a misdemeanor.

McCulley also argued and presented evidence that TPD Detectives' Olivas and K. Thomson, conspired to procure groundless state indictments and charges, based upon fabricated evidence or false, distorted perjurious testimony presented to official body.

McCulley argued and demonstrated facts from his complaint that his superior court criminal conviction was overturned, and the pending charges did not result in a conviction based on the underlying criminal charge. McCulley stated that the legality of a search and seizure "would not necessarily imply that [McCulley's] conviction was unlawful." McCulley cited several cases in support.

McCulley then argued that actual innocence is not required, and cited the juror's letter. McCulley then stated that the "actual issue here that must be addressed if the Court allows Appellees to argue facts not responded to in their Answering Brief, is whether a misdemeanor sentence, based on the underlying charge pursuant to A.R.S. section 13-1204(A)(2) and (C), being resolved pursuant to A.R.S. section 13-1204(A)(5) and (B), with a sentence of misdemeanor, resulting from the Court judging the actions of the officers, and telling McCulley that [a no contest plea]

meant "he believed he was not guilty," is a 'favorable termination'? McCulley again stated that actual innocence is not required for a common law favorable termination. *Citing Uboh v. Reno*, 141 F.3d 1000, 1005 (11th Cir. 1998); *Smith v. Holtz*, 87 F.3d 108, 113 (3rd Cir. 1996) (*citing Restatement of the Law of Torts*, section 659, 660 (1938); *see also Janetka v. Dabe*, 892 F.2d 187, 190 (2nd Cir. 1998)

The Ninth Circuit, based on all these arguments, did grant McCulley's Motion for Judicial Notice. (*See* Petitioners' Appendix E) Notice of judicial notice was actually given when McCulley sent the Appellees/Petitioners both his Answer and the Motion for Judicial Notice.

McCulley's Motion for Judicial Notice; and Motion for the Remainder of or Related Writings or Recorded Statements Under Fed.R.Civ.P., Rules of Evidence 106 and 803, is fully set forth in Petitioners' Petition for A writ of Certiorari, Appendix F, The Appellees/Petitioners, an adversely affected party learned in advance that judicial notice was in contemplation, by virtue of being served with a copy of the request, on May 21, 2004. The Appellees' experienced lawyers did not request an opportunity to be heard at that point. Fed.R.Civ.P., Rules of Evidence 201(c)

McCulley argued that the [Ninth Circuit] court could take judicial notice of, whether there is evidence that McCulley's ultimate conviction and sentence was a "favorable termination" and were not based on the original complaint; and whether there was evidence that the trial Court determined that McCulley's mental condition was relevant; and that he did not charge the two officers with a deadly weapon, to wit: a knife.

McCulley fully stated all the statutes that directly relate to the issue of favorable termination. McCulley stated that he was ultimately found not guilty, period, McCulley stated that the Court of Appeals could take judicial notice of state court documents showing filing dates for state petitions for post-conviction relief; and the Court can also take judicial notice of documents filed in state court actions that were relevant to matter at hand, citing several cases in support of his arguments.

On August 4, 2004, the Court of Appeals filed its Order stating that "McCulley's motion for judicial notice is granted. The City of Tucson's petition for panel rehearing is denied. No further filings shall be accepted in this closed appeal." (*See* Petitioners' Appendix C and E) **Over 90 days later the Petitioner filed their Petition for a Writ of Certiorari. Fed.R.Civ.P., Rules of Supreme Court, R. 13(1).**

The respondents learned in advance that judicial notice was in contemplation, by virtue of being served with a copy of the request or Motion for Judicial Notice. The respondents request to be heard after the Ninth Circuit granted the motion for judicial notice was untimely. Fed.R.Civ.P., Rules of Evidence 201(e)

REASONS FOR DENYING THE WRIT

This aspect of the case is controlled by *Heck v. Humphrey*, 512 U.S. 475, 487, 114 S.Ct. 2364, 2372 (1994) ("the plaintiff [must] demonstrate that the conviction or sentence [A.R.S. section 13-1204(A)(2) and (C)] has already been invalidated. [And] if the district court determines that the plaintiff's action, even if successful, will not demonstrate the invalidity of any outstanding [misdemeanor]

criminal judgment against the plaintiff, the action should be allowed to proceed. *See* Note #7.)

The criminal trial court's allowing a no contest plea to A.R.S. section 1204(A)(5) and (B), on October 23, 2001, (Appendix D) with the resulting misdemeanor charge 364 days later, which was pursuant to A.R.S. section 13-702(G); and the facts surrounding the April 1, 2004, Motion to Set Aside, did result in a 'favorable termination' of the underlying criminal conviction, pursuant to A.R.S. Section 1204(A)(2) and (C), because the original underlying conviction or sentence had been invalidated; and McCulley's action, even if successful, will not demonstrate the invalidity of the outstanding misdemeanor criminal judgment against McCulley.

Heck v. Humphrey, 519 U.S. 475, 487 n.7, 114 S.Ct. 2364, 2373 n.7 (1994) states that "a suit for damages attributable to an alleged unreasonable search may lie even if the challenged search produces evidence that was introduced in a state criminal trial resulting in the section 1983 plaintiff's still-outstanding conviction. . . . Such a section 1983 action, even if successful would not necessarily imply that the plaintiff's [misdemeanor] conviction was unlawful."

McCulley's complaint was for an unreasonable search and seizure and for excessive force. McCulley's injury claim was that he never has been afforded the opportunity to present his evidence and arguments on the claim. *General Elec. Capital v. Lease Resolution*, 128 F.3d 1074, 1083 (7th Cir. 1997); *Walker v. Schaeffer*, 854 F.2d 138, 143 (6th Cir. 1988) ("did not have a reasonable and fair opportunity to litigate their contentions that defendants violated their constitutional or lawful rights under the

circumstances of their arrest and detention.") McCulley has never claimed that he was falsely arrested or falsely imprisoned.

McCulley's no contest plea to A.R.S. section 13-1204(A)(5) and (B), his sentencing pursuant to A.R.S. section 13-702(G); and after a full hearing of the facts the final ruling by the trial court to Set Aside Judgment, pursuant to A.R.S. section 13-907 which required a determination of the court under subsection (B)(2) [as to it] involving the use or exhibition of a deadly weapon or dangerous instrument, clearly met the requirement in *Heck* that "termination of the prior criminal proceeding in favor of the accused." *Id.* 512 U.S. at 484, 114 S.Ct. at 2371.

Other courts have stated that "a favorable termination depends on the surrounding facts." *In Re American Continental Corp.*, 102 F.3d 1524, 1537 (9th Cir. 1996); and that "Notwithstanding dismissal of the action, settlement may be a favorable termination." *Bradshaw v. State Farm Mut. Auto. Ins.*, 157 Ariz. 411, 758 P.2d 1313, 1321 (Ariz. 1988); *See Frey v. Stoneman*, 150 Ariz. 106, 110-11, 722 P.2d 274, 278-79 (1986); and *See also* Restatement section 674 comment j (favorable termination may arise from the withdrawal of the proceedings by the person bringing them").

The October 23, 2001 underlying charge was concluded by a plea settlement, after extensive arguments by McCulley, rather than an adjudication on the merits; [however] the termination may nonetheless be favorable to McCulley. *Giles v. Hill Lewis Marce*, 195 Ariz. 358, 988 P.2d 143, 147 (Ariz. App. Div. 2 1994). The trial court knew the true facts of McCulley's case and "the true facts,

not the form of disposition, are determinative." *See Bradshaw*, 157 Ariz. at 419, 758 P.2d at 1321.

The April 1, 2004, Set Aside Judgment, pursuant A.R.S. section 13-907(A), with particular reference to subsection (B)(2) which states that this section does not apply to a person convicted of a criminal offense ... involving the use or exhibition of a deadly weapon or dangerous instrument, came after the State had a full opportunity to respond and then Officers Schwenn and Peasley had a full opportunity to testify, and the fact that McCulley again demonstrated his argument that he only went to the door to close it. The Order further included that: [1] the judgment and conviction in this case is set aside and vacated; [2] The plea of guilty is withdrawn; [3] The indictments/citations/complaints are dismissed with prejudice. McCulley had proven that the prior criminal proceeding, whatever it's extent, had terminated in his favor.... [and] there had been a *judicial ascertainment* of the fact that the arrest [based on the use of a knife] was unlawful, evidenced by [the] order dismissing the indictments/citations/complaints, with prejudice. *Heilig-Meyers Furniture Co.*, 525 S.E.2d 145, 147 (Ga.App. 1999).

This was clearly a judgment on the merits for McCulley after a trial, which is always a favorable termination. The termination here or dismissal indicates in some fashion that the accused [McCulley] is innocent of wrongdoing [using a deadly weapon] is a favorable termination. *Lane v. Terry H. Pillinger, P.C.*, 189 Ariz. 152, 939 P.2d 430, 432 (Ariz.App. 1 1997). Further the dismissal was without prejudice so that McCulley may reassert his claims ... and a successful section 1983 action for an unreasonable search "would not *necessarily* imply that [McCulley's] conviction [for a misdemeanor charge] was

unlawful." *Trimble v. City of Santa Rosa*, 49 F.3d 583, 585 (9th Cir. 1993).

To hold that an acquittal does not constitute a favorable termination would be particularly inappropriate in this case, where the charge for which McCulley was acquitted was more serious than the one for which he was convicted. Aggravated assault on a police officer, under the facts of the case, was a misdemeanor, based on the juror's letter, and the actual facts and statements from TPD Officers Schwenn and Peasley. *See Janetka v. Dabe*, 892 F.2d 187, 190 (2nd Cir. 1989). The circumstance, known to the trial court clearly indicated the innocence or freedom from liability of McCulley, and under these particular circumstances and merits of the underlying case, termination was actually favorable. *Frey v. Stoneman*, 150 Ariz. at 278-279. *See also Day v. Zubel*, 922 P.2d 536, 539 (Nev. 1996).

Proceedings are "terminated in favor of the accused" only when their final disposition is such as to indicate the accused is not guilty, in this case of the use of a deadly weapon, a knife. *Singleton v. City of New York*, 632 F.2d 183, 193 (1980); Restatement (Second) of Torts section 660, Comments a & b (1977); and *see Lackner v. LaCroix*, 159 Cal.Rptr. 693, Cal. 602 P.2d 393, 394-95 (1980) ("a favorable termination must further reflect on his innocence of the alleged wrongful conduct"); *Owen v. Shores*, 24 Ariz. 250, 537 P.2d 978, 980-81 (1975); *Kelly v. Cooper*, 502 F.Supp. 1371, 1377 (1980) ("An essential element of this cause of action is that the proceedings terminate in a manner "not unfavorable" to the plaintiff.

THE NINTH CIRCUIT TOOK JUDICIAL NOTICE OF THE LAWS STATED HEREIN

In the first place, it must be established that the particular fact, i.e., that when the criminal trial court, in McCulley's case designated the offense a misdemeanor, given the language of A.R.S. section 13-702(G), the court had to, and did, make a finding that one of the necessary elements of the original offense was not there, is one that may be judicially noticed.

The Petitioners had an opportunity to be heard as to the propriety of taking judicial notice when McCulley filed his motion. There was no such request under Fed.R.Civ.P., Rules of Evidence 201(e), therefore, the fact that the court took judicial notice of a fact or the tenor of the notice taken **is not grounds for later appeal**. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 24 Fed. R. Evid. Serv. 771, 10 Fed. R. Serv. 3d 810 (11th Cir. 1988).

Judicial notice may be taken at any stage of the proceedings, Fed.R.Civ.P., Rules of Evidence 201(f) And every fact upon which, in any view, depends the question whether a document purporting to be a statute has, by legislative action, been invested with the force of law is in its nature a public fact and will be noticed by the court in determining what is the law of the state.

A matter of law can be judicially noticed as a matter of fact, i.e., the court can look to the law not as a rule governing the case before it but as a social fact with evidential consequences. *City of Wichita, Kan. v. U.S. Gypsum Co.*, 72 F.3d 1491 (10th Cir. 1996).

The law is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably

be questioned," it has become common to speak of courts as taking judicial notice of the law. *Patterson v. City of Phoenix*, 103 Ariz. 64, 67, 436 P.2d 613, 616 (1968) ("in this state we take judicial notice of the statutes . . . ."); *Mercer v. Vinson*, 85 Ariz. 280, 288, 336 P.2d 854, 860 (1959) ("public statutes need not be plead or offered in evidence since courts will take judicial notice thereof"); *In Re Hindi*, 71 Ariz. 17, 222 P.2d 991 (1950) (Rule of Civil Procedure, R. 201); *Earhart v. Frohmiller*, 65 Ariz. 221, 178 P.2d 436 (1947); *Sweeney v. Winslow Gas Co.*, 64 Ariz. 51, 165 P.2d 316 (1946).

It was proper for the Ninth Circuit Court of Appeals to judicially notice matters outside the record, because they were generally known within the territorial jurisdiction of the trial court or capable of accurate and ready determination by resort to entrees whose accuracy cannot reasonably be questioned. *Norman v. Housing Authority of City of Montgomery*, 836 F.2d 1292, 24 Fed. R. Evid. Serv. 771, 10 Fed. R. Serv. 3d 830 (11th Cir. 1998).

Based on the language of the statute, A.R.S. section(s): 13-1204(A)(5) and (B); 13-702(G); and 13-907(A) ("except as provided in subsection B"):

B. This section does not apply to a person convicted of a criminal offense:

> 2. Involving the use or exhibition of a deadly weapon or dangerous instrument,

and based upon the criminal trial court having ordered the case designated a misdemeanor, the Court, in fact, made the factual findings that McCulley was completely innocent of the original charge, pursuant to A.R.S. section 13-1204(A)(2) and (C), which had as a necessary element of

the charged offense the use/or threatening exhibition of a deadly weapon (a knife). When the court designated the offense a misdemeanor, he necessarily found McCulley not guilty of the original underlying charge, which had as a necessary element of the offense a fact that could not exist if the case was to be designated a misdemeanor or eventually set aside.

CONCLUSION

It would be inappropriate to grant certiorari on the issue of 'favorable termination,' or whether the Ninth Circuit Court of Appeals abused its discretion in taking judicial notice, particularly where the Petitioners were given notice, and failed to timely request an opportunity to be heard. The Ninth Circuit could take judicial notice of the laws and statutes of Arizona.

Respectfully submitted,

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